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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER LEE BROWN, Defendant and Appellant.	B261595 (c/w B264335) (Los Angeles County Super. Ct. No. GA091665)

APPEALS from orders of the Superior Court of Los Angeles County. Jared D. Moses, Judge. Affirmed.

Caneel C. Fraser and Melissa L. Camacho-Cheung, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and Wyatt E. Bloomfield, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to Proposition 47 (Pen. Code, § 1170.18),[1] appellant Christopher Lee Brown petitioned the trial court to have his felony burglary convictions reduced to misdemeanor shoplifting and to have a one-year sentence enhancement for a felony "prior" stricken because the prior conviction was reduced to a misdemeanor after his burglary convictions and sentencing in the instant case. The trial court denied the petitions, and appellant appeals. We find appellant did not meet his burden of showing that his burglaries constitute shoplifting. As to the second issue, we hold that pursuant to our decision in *People v. Williams* (2016) __Cal.App.4th __ [2016 Cal.App. Lexis 170] (*Williams*), the trial court correctly refused to strike the enhancement.

BACKGROUND

Procedural History

A jury convicted appellant of two counts of second degree commercial burglary (§ 459) (counts 1 & 2) and one count of receiving stolen property (§ 496, subd. (a)) (count 3). In a bifurcated proceeding, the trial court found appellant had suffered two prior prison terms (§ 667.5, subd. (b)).

On March 12, 2014, the trial court sentenced appellant to a term of four years eight months in county jail, pursuant to section 1170, subdivisions (h)(1)-(2), determined as follows: The midterm of two years for the burglary in count 2, plus a consecutive eight months (one-third the midterm for count 1), plus two years for the two prior prison enhancements. The sentence on count 3 was stayed pursuant to section 654.

On May 14, 2014, the trial court found that appellant was no longer eligible to serve his sentence in jail pursuant to section 1170, based on his new conviction in another case. The court modified the sentence to reflect a state prison sentence.

On November 4, 2014, the voters approved Proposition 47, the "Safe Neighborhoods and Schools Act," which provides that certain drug and theft-related felonies may be reduced to misdemeanors, even after the felony sentence has been fully served.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

On November 19, 2014, appellant filed a "Petition for Recall of Sentence," requesting the trial court to reduce all three of his felony convictions to misdemeanors. On November 26, 2014, the court denied the petition without appellant or his counsel present.

On January 7, 2015, appellant filed a "Motion to Reconsider Proposition 47 Ruling." He asserted that the value of the property related to each of the three counts was under $950, and that counts 1 and 2 (for robbery) should be redesignated as shoplifting (§ 459.5). On January 9, 2015, the trial court reduced count 3 (receiving stolen property) to a misdemeanor, but denied the motion as to counts 1 and 2. The court resentenced appellant to 365 days in county jail on count 3, and stayed the sentence pursuant to section 654. On January 14, 2015, appellant filed a notice of appeal from this ruling.

On April 8, 2015, one of appellant's "priors" in case No. GA087375 (receiving stolen property with a conviction date of Feb. 27, 2013) was reduced to a misdemeanor by the judge in that case. On April 21, 2015, appellant filed a "Sentencing Memorandum" in the instant case, arguing that because one of his priors was now a misdemeanor, the corresponding one-year enhancement under section 667.5, subdivision (b) was no longer valid and his sentence in the instant case should be reduced by one year. On April 29, 2015, the trial court denied appellant's request for resentencing. On May 15, 2015, appellant filed a second notice of appeal from this ruling. The two appeals have been consolidated.

Meanwhile, appellant's appeal from the underlying judgment of conviction in the instant case was pending in this court. On June 2, 2015, we affirmed this judgment in an unpublished opinion (*People v. Brown*, B254939).

Factual History[2]

Appellant was a transient who frequently trespassed on an office campus located in the City of Alhambra (the campus). The campus had numerous buildings that housed multiple companies and government agencies. Rolando Valdovinos (Valdovinos), a

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[2] These facts are taken from our prior opinion in *People v. Brown* (June 2, 2015, B254939) [nonpub. opn.].

security guard at the campus, had told appellant he was not allowed on the campus and not to come back.

AHMC Healthcare (AHMC) had an office on the sixth floor of one of the campus buildings. AHMC provided billing and reporting services for six regional hospitals. The company maintained the personal data of approximately 700,000 patients of the hospitals. The doors to AHMC's office were kept locked and could only be opened by swiping an electronic badge. AHMC's office was closed to the public, and Saturdays were not normal working days for employees.

Count 1 (Second Degree Burglary)

On December 3, 2013, around 11:30 a.m., security officer Valdovinos received a call that a suspicious person was on AHMC's floor. (*People v. Brown, supra,* B254939.) Valdovinos went to the building and eventually saw appellant on the ground floor pushing a wheeled office desk chair out of the building. The chair held a light fixture and books. The chair was taken from an area on the first floor where salvaged equipment was stored. The chair was the property of the County of Los Angeles, which had offices in the building. Valdovinos confirmed with the facilities manager for the Los Angeles County Public Health Substance Abuse Program, located in the building, that appellant did not have permission to take the property.

Count 2 (Second Degree Burglary)

On Saturday, October 12, 2013, AHMC's security cameras recorded appellant entering the office and walking around the floor, through cubicles, and trying to open locked interior office doors. (*People v. Brown, supra,* B254939.) Appellant was later recorded carrying what appeared to be a bag out of the office. When AHMC employees went to work on Monday, October 14, 2013, they discovered that two laptop computers and two flash drives were missing. Both the laptops and the flash drives contained personal information of the approximately 700,000 patients. (*People v. Brown, supra,* B254939.) A camera was also missing. It was discovered that someone had shoved tissue paper into one of the locks of an entry door, which kept the door from automatically locking. This was the same door used by appellant to enter the office. As

a result of the security breach, AHMC mailed letters to all of the approximately 700,000 patients impacted by the breach. For a number of the patients, the company had to provide identity theft monitoring services.

Count 3 (Receiving Stolen Property)

On October 23, 2013, police officers located appellant and recovered from him the two missing AHMC flash drives. (*People v. Brown*, *supra*, B254939.) Testimony at appellant's trial established that individual profiles relating to stolen personal identification information sell on the black market for between $20 and $40 each.

DISCUSSION

I. Reduction of Burglary Offenses to Misdemeanors

Proposition 47 provides in part: "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section[s] 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (§ 1170.18, subd. (a).)

Proposition 47 added section 459.5, which defines shoplifting: "Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor. . . ." (§ 459.5, subd. (a).)

Appellant contends the trial court erred in failing to reduce his two felony convictions for commercial burglary (§ 459) to misdemeanor shoplifting (§ 459.5). In making this contention, appellant essentially complains about the *manner* in which the trial court reached its decision. According to appellant, the trial court erred by relying

exclusively on its own recollection of the jury trial over which it presided, rather than focusing on the "record of conviction." Appellant narrowly defines the record of conviction as "two convictions of second degree commercial burglary." Appellant asserts that this record of conviction renders his convictions presumptively eligible for Proposition 47 reduction.

The court in *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444 rejected the presumptive eligibility argument, and so do we. In *People v. Sherow* (2015) 239 Cal.App.4th 875, 878, the court held that "a petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing." The *Sherow* court noted that under Evidence Code section 500, "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (See also *People v. Perkins* (2016) 244 Cal.App.4th 129, 136–137.)

Appellant's original petition for recall contains no discussion whatsoever about the burglaries or why they qualify as shoplifting. Accordingly, appellant did not meet his burden of showing entitlement to reduction on this petition.

In his motion for reconsideration, appellant does discuss his offenses. As to count 1, he alleges the building was open because his entry was near noon; the property taken was in need of repair; a damaged chair, light and books would not exceed the value of $950; and the amount of the loss was not proven at the preliminary hearing or trial. As to count 2, appellant alleges that his entry occurred during business hours; the property taken included flash drives and laptops; laptops from 2013 or earlier would not value more than $950; and again the amount of loss was not proven at the preliminary hearing or trial.

At the hearing on the motion for reconsideration, the trial court focused largely on whether the building appellant entered qualified as a "commercial establishment" under section 459.5, which the statute does not define. The trial court concluded that it did not, stating "[t]he very nature of the term 'shoplifting,' in my opinion, implies a commercial establishment that is open to the public, a store, a business of some sort open to the public."

But we need not address the issues of whether the private office or the area in the commercial building appellant entered qualify as "commercial establishments"[3] or whether it was proper for the trial court to rely exclusively on its own memory in ruling on the motion. This is so because appellant did not meet his burden of showing that his crimes constituted shoplifting. As to count 1, appellant simply alleged that the stolen property did not exceed $950, but he did not put forth any evidence on valuation. As to count 2, the trial transcripts, on which both parties rely on appeal, demonstrate that appellant entered AHMC's office on a Saturday morning, which was not during its regular business hours. Its office was closed to the public and no nonemployees had permission to be there at that time. As the trial court noted, the security videotape showed the office was empty, and the door appellant entered had been propped open with a wad of tissue. Thus, appellant did not meet the shoplifting element of being open "during regular business hours." Additionally, no evidence of the value of the two stolen laptops or other stolen property was presented.

Thus, even assuming the trial court erred in relying on its own recollection, any error was harmless because appellant did not show that he committed shoplifting within the meaning of section 459.5.

II. Striking One-Year Prior Prison Enhancement

As noted above, after appellant was convicted and sentenced in this case, one of his priors was reduced from a felony to a misdemeanor. Appellant contends that the one-year prior prison term enhancement he received under section 667.5, subdivision (b) must therefore be stricken.

Section 667.5 requires "[e]nhancement of prison terms for new offenses because of prior prison terms." Under subdivision (b), "where the new offense is any felony for which a prison sentence or a sentence of imprisonment in a county jail under subdivision

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[3] We note that Division Five of this district recently determined that a school, at which students stole a cell phone from a locker, did not constitute a "commercial establishment" under section 459.5. (*In re J.L.* (2015) 242 Cal.App.4th 1108, 1115.) The court stated: "Shoplifting is commonly understood as theft of merchandise from a store or business that sells goods to the public." (*Ibid.*)

(h) of Section 1170 is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term or county jail term." (§ 667.5, subd. (b).) "Imposition of a sentence enhancement under Penal Code section 667.5[(b)] requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*People v. Tenner* (1993) 6 Cal.4th 559, 563.)

Just as Proposition 47 allows a person who is currently serving a sentence for a specified felony to petition for a redesignation of that felony to a misdemeanor (§ 1170.18, subd. (a)), it also allows a person who has completed his felony sentence to petition for a redesignation of that felony to a misdemeanor (§ 1170.18, subd. (f)).

Appellant argues that the language in section 1170.18, subdivision (k) is plain and unambiguous that a felony reduced to a misdemeanor is a misdemeanor "for all purposes."[4] He points out that the statute lists only one exception for firearm ownership and possession.

While appellant's appeal was pending, we had occasion to address the exact same issue of whether a prior prison term used as a sentence enhancement should be stricken when the prior is reduced to a misdemeanor under Proposition 47 *after* sentencing in the current case. In *Williams, supra*, we held "as a matter of statutory construction that the redesignation of a felony or wobbler under Proposition 47 operates from the moment of redesignation forward and does not retroactively alter the designation of that crime as a felony or wobbler." (*Williams, supra*, 2016 Cal.App. Lexis at p. *23.) We reached our holding in *Williams* after a lengthy analysis of the texts and purposes of both Proposition

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[4] Section 1170.18, subdivision (k) provides in full: "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6."

47 and section 667.5. Given that the appellant in *Williams* raised the same issues and relied on the same authority as does appellant herein, we need not repeat our analysis here. Additionally, the Fourth District in *People v. Valenzuela* (2016) 244 Cal.App.4th 692, 709 likewise concluded that Proposition 47 "contains no procedure for striking a prison prior if the felony underlying the enhancement has subsequently been reduced to a misdemeanor." (See also *People v. Carrea* (2016) 244 Cal.App.4th 966, 971; *People v. Ruff* (2016) 244 Cal.App.4th 935, 948.)

We do note that appellant, like the appellant in *Williams*, relies on *In re Estrada* (1965) 63 Cal.2d 740, 744, which held that "If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies." Appellant argues that pursuant to *Estrada* he was "entitled to any benefit from changes to the law after Proposition 47 because his case was still open." We rejected this argument in *Williams*, because *Estrada*'s presumption applied to the finality of the prior conviction being used to support an enhancement under section 667.5, subdivision (b), and not the current conviction. Here, appellant's prior conviction was in 2013, and thus became final long ago.

DISPOSITION

The orders are affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT